Supreme Court, U.S.
FILED
JUL 28 2006
OFFICE OF THE CLERK

(2)

No. 05-1624

IN THE
# Supreme Court of the United States

B. BRAUN MEDICAL INC.,

*Petitioner,*

v.

BOBBY EUGENE ROGERS AND
ROZI MEDICAL DEVICES LTD.,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY TO BRIEF IN OPPOSITION

Gary Dukarich
Joel A. Kauth
CHRISTIE, PARKER, & HALE, LLP
3501 Jamboree Rd. #6000
Newport Beach, CA 92660

Kenneth W. Starr
*Counsel of Record*
Daniel F. Attridge, P.C.
Edward C. Donovan
Andrew B. Kay
John C. O'Quinn
KIRKLAND & ELLIS LLP
655 15th Street, N.W.
Washington, DC 20005
(202) 879-5000

July 28, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

ARGUMENT ..... 3

I. The District Court Engaged In Remittitur Because It Re-Weighed The Evidence And Deemed The Jury Award Excessive. ..... 3

II. The Ninth Circuit Squarely Addressed The District Court's Grant Of Remittitur And Improperly Reinstated The Jury Verdict As The Remedy For A Seventh Amendment Violation. ..... 5

III. Fundamental Issues Of Civil Justice Do Not Evade This Court's Review Merely Because They Are Presented In "Unpublished" Opinions. ..... 7

CONCLUSION ..... 9

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*Ash v. Tyson Foods, Inc.*,
126 S. Ct. 1195 (2006) ..... 3, 8

*C.L. Maddox, Inc. v. Benham Group, Inc.*,
88 F.3d 592 (8th Cir. 1996) ..... 4

*Central Office Telephone, Inc. v. American Telephone & Telegraph Co.*,
108 F.3d 981 (9th Cir. 1997) ..... 4

*Dastar Corp. v. Twentieth Century Fox Film Corp.*,
539 U.S. 23 (2003) ..... 7

*Domino's Pizza, Inc. v. McDonald*,
126 S.Ct. 1246 (2006) ..... 7

*Dye v. Hofbauer*,
126 S. Ct. 5 (2005) ..... 3, 8

*Gasperini v. Center for Humanities, Inc.*,
518 U.S. 415 (1996)..... 2, 4, 5, 6

*Hoover v. Valley West D M*,
823 F.2d 227 (8th Cir. 1987) ..... 4

*Johansen v. Combustion Eng'g*,
170 F.3d 1320 (11th Cir. 1999) ..... 4

*Kane v. Garcia Espitia*,
126 S. Ct. 407 (2005) ..... 3, 7

*Kennon v. Gilmer*,
131 U.S. 22 (1889) ..... 2, 6

*Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*,
285 F.3d 1146 (9th Cir. 2002) ..... 4

*Ross v. Kansas City Power & Light Co.*,
293 F.3d 1041 (8th Cir. 2002) ..... 4

*Salinas v. United States*,
126 S. Ct. 1675 (2006) ..... 3, 8

*Tronzo v. Biomet, Inc.*,
236 F.3d 1342 (Fed. Cir. 2001)..... 3, 4

**Rules**

9th Cir. R. 36-3(b)..... 8

Fed. R. App. P. 32.1..... 8

S. Ct. R. 10(a) ..... 7

## INTRODUCTION

Respondents' Brief in Opposition labors mightily to change the subject because respondents have no answer to the charge that the Ninth Circuit's holding—per Judges Pregerson, Cowen (sitting by designation), and Thomas—is not only manifestly wrong, but turns well-established remittitur practice upside down and conflicts with the holdings of the Second, Fifth, Sixth, Eighth, and Tenth Circuits. Tellingly, respondents do not dispute that the proper remedy—indeed, the only remedy approved by every other circuit to consider the issue—for failing to offer a new trial in lieu of remittitur is to remand rather than reinstate a jury verdict found by the district court to be unlawfully excessive. Instead, respondents seek to avoid the straightforward and fundamental issue presented in B. Braun Medical Inc.'s ("Braun's") Petition for Writ of Certiorari by mischaracterizing both the action taken by the district court in this case as well as the Ninth Circuit's holding with respect to that action on appeal. That holding, *which is necessarily predicated on the district court's failure to offer a new trial in lieu of remittitur*, upsets the constitutionally sensitive balance between the power of the judge and the authority of the jury in our civil justice system.

To arrive at their misguided destination, respondents not only mischaracterize the opinions below, but misstate this Court's fundamental principles of remittitur jurisprudence. Respondents suggest that where a district court believes the weight of the evidence does not support the verdict, the court may simply reduce a damages award "to the maximum amount legally permissible under the

evidence," *as a "question of law,"* without offering a new trial. BIO 13 (emphasis added). This is a gross misstatement of the law. Nor does this Court's decision in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 435 (1996), say anything of the sort. Here, it is manifestly obvious that the district court re-weighed the evidence and concluded that it would not support the jury award. Cert. App. 33a. That is classic remittitur, which requires the offering of a new trial. Failure to do so prejudices not only respondents, but also Braun. *See Kennon v. Gilmer*, 131 U.S. 22, 30 (1889).

Likewise, on appeal the Ninth Circuit squarely held that the district court's "substitut[ion of] its own judgment as to the damages that should have been awarded ... violated the Seventh Amendment." Cert. App. 10a. To be sure, the Ninth Circuit also considered whether the district court had attempted to enter judgment as a matter of law and held that, "to the extent that the district court founded its decision on a belief that the damages were precluded as a matter of law, it erred." *Id.* That additional holding in no way affects the issue presented. After all, whether or not the district court could remit damages *as a matter of law* has no bearing on whether it could remit damages *based on a re-weighing of the evidence* (so long as a new trial was offered). Because the district court granted remittitur without offering a new trial, the proper remedy was remand—not the reinstatement of an unlawfully excessive damages award.

Finally, respondents seek to evade this Court's review by raising as a fig-leaf the fact that the Ninth Circuit's decision was "unpublished." That is an

open invitation to lawlessness. Indeed, this Court has not hesitated to review substantial issues raised in unpublished opinions. To the contrary, as demonstrated just last Term, such cases are often well suited for summary reversal. *E.g.*, *Salinas v. United States*, 126 S. Ct. 1675 (2006) (*per curiam*); *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195 (2006) (*per curiam*); *Kane v. Garcia Espitia*, 126 S. Ct. 407 (2005) (*per curiam*); *Dye v. Hofbauer*, 126 S. Ct. 5 (2005) (*per curiam*).

## ARGUMENT

### I. The District Court Engaged In Remittitur Because It Re-Weighed The Evidence And Deemed The Jury Award Excessive.

Respondents' primary contention is that this case does not merit review because the district court granted judgment as a matter of law rather than remittitur. Even cursory review of the district court's opinion belies this red herring.

Here the district court did not strike down a "whole category" of damages as a matter of law. BIO 3, 10. Rather, after "considering *the totality of the evidence* and the permissible inferences the jury could have made from it," the Court found the jury's award of compensatory damages was "*not supported by sufficient evidence* to sustain it." Cert. App. 33a (emphasis added). Thus it "remit[ted] $11,000,000" in compensatory damages. That is the very essence of "reweighing" the evidence. *Tronzo v. Biomet, Inc.*, 236 F.3d 1342, 1351 (Fed. Cir. 2001).

Respondents incredibly assert that "the principle that determining the 'upper limit' of damages sustainable on the evidence is not a question of fact,

but a question of law," and thus, "[b]y reducing damages to the maximum amount legally permissible under the evidence, a court decides a question of law." BIO 13. Not so. In *Gasperini*, which they cite for this proposition, the "upper limit" discussed by this Court was the limit *on the discretion of the trial judge*, not a "maximum amount [of damages] legally permissible." 518 U.S. at 435. Indeed, not one of the cases cited by respondents involved a judicial determination that the weight of the evidence did not support the amount of the verdict, but instead other extrinsic *legal* limitations on the award of damages. Virtually all of respondents' cases involved the *constitutional* limit on the award of punitive damages—which, of course, is a purely legal issue for which no new trial is required to be offered. *See Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 285 F.3d 1146, 1151 (9th Cir. 2002); *Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1049-50 (8th Cir. 2002); *Johansen v. Combustion Eng'g*, 170 F.3d 1320, 1330-31 (11th Cir. 1999).

Respondents' assertions notwithstanding, this is not a case where the district court took "away a whole category of damages," BIO 10, as in *Tronzo*, 236 F.3d at 1351-52 (eliminating damages associated with inadmissible evidence), or *Central Office Telephone, Inc. v. American Telephone & Telegraph Co.*, 108 F.3d 981, 993 (9th Cir. 1997) (eliminating damages associated with unreliable expert testimony). There is no "identifiable sum[]" of damages that the district court eliminated. *C.L. Maddox, Inc. v. Benham Group, Inc.*, 88 F.3d 592, 603 (8th Cir. 1996); *see also Hoover v. Valley West D M*, 823 F.2d 227, 230 (8th Cir. 1987) (holding verdict

properly reduced because plaintiff, as a matter of law, failed to prove damages on one independent issue). Rather, the district court (rightly) determined that $16 million in compensatory damages was excessive and remitted $11 million without apportioning any aspect of the award based on a failure of proof, inadmissible evidence, or legal theories stricken as a matter of law.

## II. The Ninth Circuit Squarely Addressed The District Court's Grant Of Remittitur And Improperly Reinstated The Jury Verdict As The Remedy For A Seventh Amendment Violation.

On appeal, the Ninth Circuit plainly recognized that the district court had granted remittitur without offering a new trial option. It could not have been any clearer: "In this case, the district court reduced the compensatory damages award without affording [respondents] the option of a retrial." Cert. App. 10a. It then made the independent, *de novo* determination that "the jury award is not against the clear weight of the evidence," and "must be reinstated." *Id.* What the Ninth Circuit failed to do—in contrast to every other court of appeals to consider the issue—was *remand* to allow the offering of a new trial, and then if (and only if) a new trial was accepted and the case appealed, review the district court's original remittitur *for an abuse of discretion*. *Gasperini*, 518 U.S. at 435 (holding "[t]he court of appeals should then review the district court's determination *under an abuse-of-discretion standard*") (emphasis added) (internal quotations omitted). Because the Ninth Circuit never determined that the district court abused its

discretion there is nothing in the record to contradict the district court's finding that the jury award was excessive.

Braun obviously has standing to challenge the Ninth Circuit's reinstatement of the jury award found by the district court to be excessive—after all, it is Braun that has been "punish[ed]" with that excessive award. Cert. App. 32a. Had the Ninth Circuit properly remanded for a new trial to be offered then respondents would have either accepted the remittitur or sought a new trial. Either way Braun would be better off than it is now: it "would have been protected from the possibility of being obliged in any event to pay the larger sum" or "would have had a new trial generally." *Kennon*, 131 U.S. at 30. The Ninth Circuit's attempt to short-circuit the process to Braun's detriment is simply impermissible. Rather than exercise the "restraint" counseled by this Court, the Ninth Circuit ignored jurisdictional limitations to reach out and decide an issue only properly presented *after* the grant of a new trial. *Gasperini*, 518 U.S. at 438.

Respondents also seek to confuse the issues by invoking the Ninth Circuit's holding that the district court "erred as a matter of law" to the extent that it ruled respondents were "not entitled to damages for unjust enrichment." Cert. App. 9a. That is entirely beside the point. Regardless of whether the district court mistakenly believed that respondents were not entitled to certain kinds of damages, it unquestionably found that the compensatory damages award was generally excessive and "remit[ted] $11,000,000" based on the "totality of the evidence." *Id.* 32-33a. Because the Ninth Circuit

reviewed the district court's grant of remittitur and found it inconsistent with the Seventh Amendment's jury-trial requirement, the proper remedy was remand to allow the district court to offer respondents the option of a new trial. The Ninth Circuit's new *per se* approach warrants this Court's full review or—given the clarity of the issues presented and the uniformity of the courts of appeals—summary reversal.

## III. Fundamental Issues Of Civil Justice Do Not Evade This Court's Review Merely Because They Are Presented In "Unpublished" Opinions.

Finally, perhaps recognizing the weakness of their position, respondents desperately protest that review is unnecessary because the Ninth Circuit's radical new approach to remittitur is embodied in an unpublished opinion. That is nothing more than an invitation for this Court to abdicate its responsibility of ensuring that the courts of appeals uniformly apply the law and do not "depart[] from the accepted and usual course of judicial proceedings," S. Ct. R. 10(a), and for courts of appeals, in turn, to make mischief in their unpublished opinions. Of course, this Court has not hesitated to review the Ninth Circuit's unpublished decisions when they presented an issue of fundamental importance, as here. *See, e.g., Domino's Pizza, Inc. v. McDonald*, 126 S.Ct. 1246 (2006) (reversing 107 Fed. Appx. 18 (9th Cir. 2004)); *Kane*, 126 S. Ct. 407 (reversing 113 Fed. Appx. 802 (9th Cir. 2004)); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) (reversing 34 Fed.Appx. 312 (9th Cir. 2002)). Indeed, as noted above, just last Term this Court summarily

reversed in several cases where the courts of appeals' decisions were unpublished. *See, e.g.*, *Salinas*, 126 S. Ct. 1675; *Ash*, 126 S. Ct. 1195; *Kane*, 126 S. Ct. 407; *Dye*, 126 S.Ct. 5.[1]

Here, the Ninth Circuit violated bedrock principles of appellate review—and created a circuit conflict—by holding that the appropriate remedy for a district court's failure to offer a new trial (in lieu of accepting remittitur) is to reinstate a verdict that the district court had already found to be excessive. This revolutionary *per se* approach to Seventh Amendment violations imposes what is effectively an $11 million penalty on Braun—an award the district court expressly found constituted improper punishment at the hands of the jury—based on the district court's uninvited mistake. By permitting the reinstatement of otherwise unlawfully excessive verdicts, the Ninth Circuit's approach turns sound remittitur practice on its head. This Court should not wait for the Ninth Circuit to repeat this new practice in a published opinion, thereby penalizing Braun for the Ninth Circuit's unilateral attempt to sweep this case under the proverbial rug. Rather, given that the other courts of appeals to consider the

---

[1] Respondents' reliance on the "unpublished" nature of the Ninth Circuit's opinion in this case ignores reality. While technically "non-precedential," the opinion is widely available in electronic databases and is published in the Federal Appendix. Indeed, this Court recognized the fleeting nature of the distinction between "published" and "unpublished" opinions in its adoption of Federal Rule of Appellate Procedure 32.1 last Term. In any event, there is no restriction on citations to the opinion outside the Ninth Circuit. *See* 9th Cir. R. 36-3(b).

issue have uniformly rejected the Ninth Circuit's approach—indeed, in some cases even granted rehearing to reconsider precisely this issue—the Court should nip in the bud the Ninth Circuit's departure from the prevailing norm.

## CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, this Court should grant the petition for writ of certiorari and either summarily reverse the decision below or set the case for plenary review.

Respectfully submitted,

Gary Dukarich
Joel A. Kauth
CHRISTIE, PARKER, & HALE, LLP
3501 Jamboree Rd. #6000
Newport Beach, CA 92660

Kenneth W. Starr
*Counsel of Record*
Daniel F. Attridge, P.C.
Edward C. Donovan
Andrew B. Kay
John C. O'Quinn
KIRKLAND & ELLIS LLP
655 15th Street, N.W.
Washington, DC 20005
(202) 879-5000

July 28, 2006